INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3 - 6
FINDINGS AND DECISIONS OF THE TRIAL EXAMINER, BOARD AND COURT OF APPEALS	6 - 8
REASONS FOR GRANTING THE WRIT	9 - 19
CONCLUSION	1

APPENDIX A:	OPINION OF COURT OF APPEALS	App. 2
APPENDIX B:	DECISION OF THE NATIONAL LABOR RELATIONS BOARD AND THE TRIAL EXAMINER	App. 11
APPENDIX C:	JUDGMENT	App. 67
APPENDIX D:	DENIAL OF PETITION FOR REHEARING	App. 71
APPENDIX E:	STAY OF MANDATE	App. 73
APPENDIX F:	EXTENSION OF TIME	App. 77
APPENDIX G:	STATUTES AND CONSTITUTIONAL PROVISIONS	App. 79

CITATIONS

Cases:	Page
Adair v. United States, 208 U.S. 161	19
Detroit Bank v. United States, 317 U.S. 329	19
Dierks Forest, 148 NLRB 923 (1964)	10
Ellis v. United States, 206 U.S. 246	19
Employing Lithographers of Greater Miami, Florida v. NLRB, 301 F.2d (5th Cir. 1962)	19
Hirabayashi v. United States, 320 U.S. 81	19
I. T. & T. Corp. v. NLRB, 382 F.2d 366 (3rd Cir. 1967)	12
Local 357 Teamsters v. NLRB, 365 U.S. 667	10
Metlox Mfg. Co. v. NLRB — F.2d —, 64 LRRM 2350 (9th Cir. 1967)	12
Metlox Mfg. Co., 153 NLRB No. 124 (1965)	10
NLRB v. Arkansas Rice Growers, 400 F.2d 567 (8th Cir. 1968)	10
NLRB v. American Ins. Co., 343 U.S. 395	11, 13
NLRB v. F. W. Woolworth Co., 352 U.S. 938	10
NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 498 (1960)	11, 13

CITATIONS (Cont'd)

Cases:	Page
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	18
NLRB v. Katz, 369 U.S. 736	10
NLRB v. Local 74 United Broth. of Carpenters & Joiners of America, A.F.L., 181 F.2d 126 (6th Cir. 1950) *aff'd* 341 U.S. 707	18, 19
NLRB v. Movie Star Inc., 361 F.2d 346 (5th Cir. 1966)	10, 12
NLRB v. News Syndicate Co., 365 U.S. 695	10
NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), *cert denied* 346 U.S. 887	11
NLRB v. Texas Coca Cola Bottling Co., 365 F.2d 321 (5th Cir. 1966)	11
NLRB v. Truitt Mfg. Co., 224 F.2d 869, (4th Cir. 1965)	9
NLRB v. Washington, Virginia & Maryland Coach Co., 85 F.2d 990 (4th Cir. 1936), *affd.* 301 U.S. 142	18
NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966)	10, 12
NLRB v. Wooster Div. of Borg-Warner Corp., 353 U.S. 907	10

CITATIONS (Cont'd)

Cases:	Page
Stanley Building Specialties Co., 166 NLRB No. 110	App. 11
Sylvania Electric Products Inc. v. NLRB, 291 F.2d 132 (1st Cir. 1961)	12
Texas & P. Ry. Co. v. Broth. of R. Trainmen, 63 F.Supp. 640 (D.C. La. 1945), reversed on other grounds 159 F.2d 822 (5th Cir. 1947), *cert. denied* 332 U.S. 760	19
Truitt Mfg. Co. v. NLRB, 351 U.S. 149	9, 10, 11, 12
Truitt Mfg. Co., 110 NLRB 856 (1954)	9
United Fireproof Warehouse Co. v. NLRB, 356 F.2d 494 (7th Cir. 1966)	12
United Steelworkers of America, AFL-CIO, Local 5571 v. NLRB, 401 F.2d 434 (D.C. Cir. 1968)	2, 12
United Steelworkers of America, AFL-CIO v. NLRB, 390 F.2d 846 (D.C. Cir. 1967)	11

STATUTES AND CONSTITUTIONAL PROVISIONS

National Labor Relations Act. as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 7 ..... 16, 17, 18

Section 8(a)(1) ..... App. 79

Section 8(a)(3) 8

Section 8(a)(5) 2, 7, 8, 10, 14

Section 8(d) 12, 13, 14

U. S. CONST. Amend. V. 8, 19

CONGRESSIONAL RECORD:

Cong. Rec. H.R. Rep. No. 245 80th Cong. 1st Sess. 7 13

Cong. Rec. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34 13

in the

Supreme Court

of the

United States

Term

No. _____

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Stanley-Artex Windows, Division of the Stanley Works, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in case number 21,343 on November 21, 1968.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 2-10) is reported at 401 F.2d 434. The decision and order of the National Labor Relations Board and the Trial Examiner's decision (App. B, *infra*, pp. 11-66) are reported at 166 NLRB No. 110.

JURISDICTION

The decision of the court of appeals was issued on September 3, 1968 (App. A, *infra*, p. 2) and the judgment was entered November 21, 1968 (App. C, *infra*, pp. 67-69). Petitioner's timely petition for rehearing was denied on January 2, 1969 (App. D, *infra*, p. 71-72). Pursuant to petitioner's timely motions, the mandate of the court of appeals was stayed until May 2, 1969 (App. E, *infra*, pp. 73-76), the date to which Chief Justice Earl Warren extended the time for the instant petition to be filed (App. F, *infra*, p. 77).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the National Labor Relations Board and the court of appeals may find an employer who clearly has bargained in good faith to be in violation of Section 8(a)(5) of the Act solely because he pleads inability to meet a union's wage demands and remain competitive and thereafter refuses the union's request to furnish certain financial data in support of said position, and (2) Whether the National Labor Relations Board and the court of appeals may hold that where unfair labor practice strikers are reinstated under business conditions requiring a work force including all strikers, non-strikers and strike replacements an employer must discriminate against non-strikers and strike replacements in a subsequent legal lay off by laying them off first and affording the returning strikers a preferential right to retention regardless of the employer's unquestionably legal method of selecting employees for lay off.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et. seq.*), are set forth in Appendix G, *infra*, pp. 79-80.

STATEMENT OF THE CASE

Petitioner, a division of The Stanley Works, is licensed to do business in Florida where it engages in the manufacture, sale and distribution of window products (App. B, *infra*, p. 31).[1]

Petitioner has had a long and peaceful collective bargaining relationship with the union[2] which resulted in labor contracts in 1961, 1962 and 1963 (App. B, p. 33; R. 37). The last contract was due to expire on January 30, 1965, accordingly petitioner and the union commmenced negotiating a new agreement on October 19, 1964 (App. B, p. 14, 33, 54; R. 37-38).

Between October 19, 1964, and January 30, 1965, petitioner and the union met and negotiated on six different occasions (App. B, pp. 14-17; R. 38-55). During this period, and at all times thereafter, petitioner offered to meet, confer and bargain with the union at any time it wished to discuss "anything the union wanted to discuss" (App. B, p. 62-63).

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[1] "R" references are to the Joint Appendix which comprised the record in the court of appeals and which has been certified and filed with this Court. "G.C. Exh," and "P Exh." references are to the exhibits of General Counsel and Petitioner, respectively, all of which are contained in the Joint Appendix. "App." references are to the appendices which have been separately presented in accord with Rule 23(1)(i) of this Court's rules.

[2] "Union" references are to the United Steelworkers of America, AFL-CIO, Local 5571, while "Board" references are to the National Labor Relations Board.

During these negotiations petitioner agreed to increase the insurance rate under the contract to $16.00 per day (R. 46, 47); to change the time limits under the grievance procedure (R. 46); to give vacations of two and one half weeks after ten years of service and three weeks after fifteen years of service (R. 47); to supply the union with a revised seniority list every four months (R. 47); to give a two percent across the board wage increase, which was later increased to four cents per hour (R. 49, 52); to pay the higher rate to employees with two days of accumulated experience on a job upon reassignment to that same job (R. 50); to pay time and one half for Saturday work twice each year (R. 53); to release employees called for jury duty (R. 53); to give three days of bereavement pay (R. 53); to match the holidays the union was able to negotiate with Air Control (a competitor in the industry and area) (R. 54); to give blanket coverage of the Stanley Works pension plan (R. 54); and, to increase hospitalization insurance to $18.00 per day for room and board (R. 54). Petitioner offered numerous other beneficial changes in the contract such as increased hospital fees, diagnostic and x-rays fees, a radiation therapy fee and certain wage increases for day-work employees and employees who complete their probationary period (G.C. Exh. 22, R. 134-135).[3]

In the course of negotiations, petitioner was found to have taken the position that it was unable to pay more than it was offering in terms of wages and remain com-

[3]Comparing these agreements and offers with the list of proposals made by the union (G.C. Exh. 21; R. 132) it is clear that virtually all major topics except wages were agreed to or dropped by the union prior to January 30, 1965 (R. 51, 54).

petitive[4] (App. A, p. 5; App. B, pp. 17-19) Upon the union's request, petitioner supplied the union with the financial statements of the parent company for the last five years as well as other bargaining information; however, petitioner did not comply with the union's request for a financial breakdown for petitioner's North Miami division, giving as its reasons that such a breakdown was unavailable to petitioner's negotiator and it was not the company's policy to make such information available (App. A, p. 4; App. B, p. 15; R. 45, 63-64, 82).

No final agreement had been reached by the contract termination date, thus on January 30, 1965, the union membership voted 71 to 65 to strike petitioner (App. B, p. 19-20, 41-42; R. 55-56, 67- 68).

The strike commenced January 31, 1965, and continued until March 30, 1965, when the union offered to end the strike and return all strikers to work (App. B, p. 32, 52-53; R. 8, 9, G.C. Exh. 6). Prior to the union's offer, petitioner had permanently replaced all strikers (App. B, p. 47; R. 77). On April 5, 1965, petitioner replied that it was willing to reinstate all strikers with the exception of 49 whom petitioner claimed had been permanently replaced as economic strikers[5] (App. B, p. 52; G.C. Exch. 7).

[4]Throughout this case, petitioner has taken the position that it at no time pleaded inability to meet the union's demands and remain competitive but took the legally acceptable position that it was unwilling to pay more than its competition in the industry and area. The Board's trial examiner specifically agreed and found that petitioner had no obligation to supply any of the financial data requested by the union (App. B, p. 58-61). Should the instant petition be granted petitioner intends to argue that no inability to pay plea was ever made.

[5]Although petitioner initially refused to reinstate the 49 employees enumerated in its April 5th letter to the union because of their strike misconduct, it abandoned this claim and relied solely on the defense that the 49 had been permanently replaced as economic strikers (G.C. Exh. No. 7; App. A, p. 8, note 4; App. B, p. 20, note 7).

Within a few days after the union's March 30th offer, petitioner did reinstate all strikers except the 49 enumerated in its April 5th letter (App. B, p. 52; R. 8, 77). At that time, increased customer orders and the institution of a second shift necessitated the retention of all 105 returning strikers as well as all non-strikers and strike replacements (App. B, 20, note 9, 53; R. 77-81).

Upon instructions from the parent company, petitioner, on May 1 and thereafter, laid off a number of employees, including several returning strikers and a number of non-strikers and strike replacements (App. B, p. 53; R. 77-81). Employees were selected for lay off based strictly on their foreman's assesment of their ability regardless of whether they were strikers, non-strikers, new employees (replacements), or old employees[6] (R. 77-78).

After January 31st, petitoner and the union continued to meet and negotiate with the assistance of the Federal Mediation and Conciliation Service, however, no final agreement was reached (App. B, p. 48-52; R. 57-62).

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[6]No contention was made that petitioner's selection of strikers for lay off was discriminatory independent of the strikers' status as unfair labor practice strikers (App. B, p. 53, note 7; R. 81).

FINDINGS AND DECISIONS OF THE TRIAL EXAMINER, BOARD AND COURT OF APPEALS.

In addition to finding that petitioner did not plead inability to meet the union's wage demands and remain competitive, the trial examiner reviewed the negotiations in their entirety. Applying this Courts decision in *Truitt Mfg. Co. v. NLRB*, 351 U.S. 149, the examiner held that even if petitioner did plead poverty in response to the union's wage demands and thereafter failed to adequately substantiate its plea that in light of its obvious overall good faith petitioner met its statutory obligation[7] (App. B, pp. 61-63).

Disagreeing, the Board held that petitioner claimed inability to pay more than it was offering and remain competitive. Accordingly, the Board held that petitioner's rejection of the union's demand that it supply certain financial data to support its poverty plea contributed to a stalemate in negotiations and, consequently, violated Section 8(a)(5) of the Act (App. B, p. 18-19).

Neither the Board nor the court of appeals considered the overall negotiations nor did they rule on, consider or disturb the examiner's finding of petitioner's overall good faith. Both held, in effect, that regardless of petitioner's otherwise unquestioned good faith bargaining, its failure to substantiate its poverty plea *per se* violated Section

[7]Relying on these findings and his additional finding that even if petitioner did plea poverty there was no casual relationship between the plea and the union's January, 1965, strike (App. B, p. 57-58, 63). the examiner found the strike to be economic from its inception (App. B, p. 63; R. 164-165). Inasmuch as all strikers had been permanently replaced prior to any unconditional offer to return, the examiner dismissed General Counsel's complaint that petitioner was obligated to return all unreinstated strikers. (App. B, p. 65). If the instant petition is granted petitioner intends to argue that there was no casual connection between the union's strike and what the Board found to be a poverty plea.

8(a)(5) (App. A, p. 3-5; App. B, p. 18-19). The Court enforced the Board's Order that petitioner furnish the information sought by the union (App. A, p. 10).

Accordingly, the Board and the court of appeals found that the February 1965 strike was an unfair labor practice strike from its inception and that petitioner was obligated to offer reinstatement to all strikers who had not previously been offered reinstatement (App. A, p. 6-9; App. B, p. 19-20).

Although neither the Board nor the court of appeals disturbed the examiner's findings that: (1) petitioner reemployed 105 strikers within a few days after the union's March 30th letter, (2) at that time petitioner's business necessitated the retention of all 105 strikers as well as all strike replacements and non-strikers and, (3) there was no independent evidence that petitioner's selection of employees for lay off was discriminatory (App. B, p. 52-53); both held that petitioner violated Section 8(a)(3) of the Act, when on May 1, 1965, and thereafter, it included some 12 to 15 returning strikers among a number of non-strikers and strike replacements laid off. (App. A, p. 8-9; App. B, p. 20). Ignoring the examiner's undisputed findings, the Board and the court's holding was based on the Board's finding that the lay off was caused by a labor surplus resulting from petitioner's failure to discharge strike replacements and petitioner's failure to establish that the lay offs on May 1st, and thereafter, were due to a decline in business (App. A, p. 8; App. B, p. 20, note 9). The Court enforced the Board's Order that petitioner offer reinstatement to those returning strikers who were subsequently laid off (App. A, p. 10).[8]

[8]The court of appeals noted that the Board concluded that the laid off strikers were denied reinstatement rights (App. A, p. 8, note 2), however, nowhere in the Board's decision is such a conclusion expressed.

REASONS FOR GRANTING THE WRIT

Issue 1:

1. The Board and the court of appeals misapplied this Court's decision in *Truitt Mfg. Co. v. NLRB*, 351 U.S. 149. In *Truitt* the Board found that the mere fact that an employer seeks to justify its refusal to grant a wage increase upon an economic basis and fails to submit reasonable proof of its economic situation *in and of itself* violates the employer's duty to bargain in good faith.[9]

This Court, reversing the Fourth Circuit's refusal to enforce the Board's order,[10] established the principle that while the Board may consider an employer's refusal to attempt to substantiate a claim of inability to pay increased wages in determining whether the obligation to bargain in good faith has been met:

> "We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts. (footnote omitted). The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain has been met." *Supra* at 153-154.

Thus, while upholding the Board's finding of a violation "*under the facts and circumstances*", this Court rejected the Board's application of a *per se* rule. Implicit in

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[9] *Truitt Mfg. Co.*, 110 NLRB 856 (1954).
[10] *NLRB v. Truitt Mfg. Co.*, 224 F.2d 869, (4th Cir. 1965).

the Court's decision is the principle in cases of this nature that the issue of an employer's overall, subjective good faith must be met and decided.[11] Courts of appeals and the Board have recognized the necessity of finding subjective good faith or bad faith in such cases *Western Wirebound Box Co. v. NLRB*, 356 F.2d 88 (9th Cir. 1966); *NLRB v. Movie Star Inc.*, 361 F.2d 346 (5th Cir. 1966); *Metlox Mfg. Co.*, 153 NLRB No. 124 (1965);[12] and in similar wage information cases. *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938; *NLRB v. Arkansas Rice Growers*, 400 F.2d 567 (8th Cir. 1968); *Dierks Forest*, 148 NLRB 923 (1964).

Indeed it is generally recognized, except in certain very specific situations,[13] that in every case where an em-

[11]Particularly is this true in light of the majority's holding that an employer's plea *may be considered as a factor in determining an employer's good faith* and the statement of Justice Frankfurter in the concurring and dissenting opinion that:

> "Since the Board applied the wrong standard here, by ruling that *Truitt's* failure to supply financial information to the Union constituted *per se* a refusal to bargain in good faith, the case should be returned to the Board." *Supra* at 157.

[12]It is difficult to comprehend the Board's action in the instant case in light of its holding in *Metlox Mfg. Co.*, 153 NLRB No. 124 (1965) where it held:

> "But, for a review or study of an employer's financial record and related files, the Board and the courts have limited a Union's view of these records and files to situations where the employer pleads an inability to pay a wage increase, *and in these situations, as always, the prime consideration is not the bear refusal to furnish data, but whether under the circumstances in a case, the employer by his conduct is doing violence to the principles of good faith bargaining.*" *Supra* at 1394. (Emphasis supplied)

[13]Thus a *per se* violation of section 8 (a) (5) may be found where an employer: (A) refuses to reduce agreements to writing; (B) fails to bargain about a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736; (C) adamently insists upon the inclusion of a voluntary subject of bargaining in any agrement. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 353 U.S. 907; or, (D) proposes the inclusion of an illegal subject for bargaining. *Local 357, Teamsters v. NLRB*, 365 U.S. 667; *NLRB v. News Syndicate Co.*, 365 U.S. 695.

ployer who has met and bargained with a union has been charged with bad faith bargaining the issue of good faith must be considered and decided on the basis of the employer's state of mind and intention as reflected by the totality of his conduct. *NLRB v. American Ins. Co.* 343 U.S. 395, 409-410; *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953) *cert. denied* 346 U.S. 887.[14]

> "It . . . [is] the responsibility of the Trial Examiner and the Board to glean the state of mind of the agents of the Company from an examination of all the surrounding circumstances." *United Steelworkers, supra* at 852 and cases cited in footnote 12.

While the trial examiner fulfilled his responsibility in the instant case, it is clear that neither the Board nor the court of appeals even considered the issue or petitioner's overall good faith. In fact, it is patent that both found an inability to pay plea and automatically concluded that petitioner had violated the Act. No other conclusion may be supported from the record in light of petitioner's undenied willingness to meet and confer with the union at any time on any matter; the agreements, concessions and proposals made by petitioner; and, petitioner's long and peaceful bargaining history with the union. Without a doubt, but for the Board's finding of petitioner's failure to adequately support an inability to pay plea the Board and the court would have found petitioner's bargaining the quintessence of good faith as all other significant issues were settled before the strike.

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[14]See also *NLRB v. Ins. Agents' Int'l. Union*, 361 U.S. 477, 498 (1960); *NLRB v. Texas Coca-Cola Bottling Co.*, 365 F.2d 321, 322 (5th Cir. 1966); *United Steelworkers of America, AFL-CIO v. NLRB*, 390 F.2d 846, 849-852 (D.C. Cir. 1967) (dictum), *cert. denied* 391 U.S. 904.

Thus, failing to consider the totality of petitioner's conduct and reach the issue of petitioner's overall good faith, the Board and the court of appeals have applied a *per se* rule in direct contradiction of the test established in *Truitt* and the language of the statute.[15]

2. There is a conflict among the courts of appeals for the various circuits as to the meaning and appropriate application of the Court's decision in *Truitt*. Given a situation where an employer has refused to comply with a union's request that it substantiate a plea of inability to pay the union's wages or other economic demands and remain competitive, the circuit courts are at odds as to the meaning and the application of *Truitt*. Thus, it appears that at least the First, Fifth and Ninth Circuits consider and make a finding as to the employer's overall, subjective good faith based on the employer's intention as reflected by the totality of his bargaining conduct,[16] while the Third, Seventh and District of Columbia Circuits appear to disregard the employer's subjective good faith and automatically find a violation of the employer's bargaining duty.[17] Petitioner respectfully submits that the Court should grant its writ and settle the conflict.

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[15]Section 8(d) (App. G, p. 79-80).

[16]*Sylvania Electric Products Inc. v. NLRB*, 291 F.2d 128, 132 (1st Cir. 1961); *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966); *NLRB v. Movie Star Inc.*, 361 F.2d 346, 350 (5th Cir. 1966); *Metlox Mfg. Co. v. NLRB*, F.2d 64 LRRM 2350 (9th Cir. 1967).

[17]*United Fireproof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cr. 1966) (dictum); *I.T.&T. Corp. v. NLRB*, 382 F.2d 366, 371-372 (3rd Cir. 1967); *United Steelworkers of America, AFL-CIO, Local 5571 v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968).

3. If the decision is allowed to stand, it will interfere with the purposes and policies of the Act. The Congressional policy underlying the Act is unquestionally to encourage and foster the practice and procedure of the collective bargaining.[18]

To further define the declared National policy, Congress enacted Section 8 (d) of the Act with the purpose of assuring the parties to a proposed collective bargaining agreement the greatest degree of freedom possible in their negotiations and to prevent the Board from controlling and settling the substantial terms of collective bargaining agreements.[19] *NLRB v. Ins. Agent's Union, supra; NLRB v. American Ins. Co., supra.*

Clearly, consistency with Congressional intent demands the avoidance of enunciating and/or applying *per*

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[18]"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by encouraging the practice and procedure of collective bargaining. . . . .". 29 U.S.C. 151.

[19]"**** [T]he present Board has gone very far, in the guise of determining whether or not empoyers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make **** [discussion of Board cases].

"These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." H.R. Rep. No. 245, 80th Cong., 1st Sess. 7.

"****The Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining the merits of the positions of the parties." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34.

se rules, not specifically required or allowed by the statute,[20] which would have the effect of regulating the bargaining process in its substantial aspects and predetermining good faith by objective standards.

Here the Board, with court approval, has established a *per se* rule which it will apply automatically and universally to determine the merits of an employer's position regardless of his otherwise unquestional good faith. Doubtless, if the instant decision is allowed to stand its future application will severly restrict the freedom in negotiations intended for the parties by the enactment of Section 8(d). In fact, failure to overturn the decision could lead to an interpretation of Court approval of a return to the dangerous trend of the "Board sitting in judgment" which Section 8(d) was enacted to curtail.

As was the situation here,[21] the normal course of collective bargaining involves employer representatives not trained in the niceties of labor law but who are employed internally and additionally assigned the task of working out an acceptable agreement with the union. This is as it should be, for the design of the statute is to make the collective bargaining process as simple and uncomplicated as possible so that it will become a part of an employer's normal business operation.

The instant decision expands the definition of employer conduct which will be deemed *per se* to violate Section 8 (a) (5). The effect of such an expansion, particularly as in this case where a technical, legal question

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[20]See footnote 13, *supra* at 10.

[21]Robert F. Burger, Division Plant Manager, represented Petitioner in the negotiations with the union (R. 38, 71).

is involved, would clearly encumber the bargaining process by requiring even the smallest employer faced with an obligation to bargain to hire not only a lawyer, but an expert in labor relations, to represent him.[22] To do otherwise would subject a negotiating employer to being helplessly maneuvered into technical corners by trained union negotiators and found in violation of the law, or at least of having to baragain under circumstances of legal uncertainty, regardless of his good faith intentions. Further, to allow this attempted expansion of the *per se* scheme would necessarily inject an element of formality and regimentation into the collective bargaining process which would not only remove bargaining from the management function and place it in the hands of disinterested experts but also make collective bargaining a veritable jungle of technical, absolute rules.

Thus, it is Petitioner's belief that by allowing the instant decision to stand the Court would encourage the establishment of *per se* rules in the bargaining process which could not help but make the process more cumbersome, difficult and expensive. Additionally, it would give employers, particularly in small operations, an added incentive to fight unionization in order to avoid the expensive and technical obligation to bargain in "good faith".

[22]Undoubtedly a majority of the employers who are or will become obligated to bargain with a union cannot afford this expense.

Issue 2:

1. The instant decision discriminates against non-strikers and strike replacements in violation of Section 7 of the Act.[23] The effect of the decision herein is to shield returning unfair labor practice strikers from lay off in the future at the expense of non-strikers and strike replacements. Thus, instead of returning to petitioner's work force just as if the strike had never occurred, in which case there is no doubt that the lay offs in question would have been legal,[24] the unfair labor practice strikers in this case have been given preferred treatment because, and only because, they participated in the union's February 1965 strike.

This conclusion is inescapable as at the time the strikers were returned to work (within a few days of March 30th) petitioner's increased business required a work force including all returning strikers as well as all strike replacements and non-strikers. Therefore, the replacements lost their status as strike replacements and simply became members of the large work force which included non-strikers and returning strikers. This expanded work force continued to work without substantial

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[23]"Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 U.S.C. 157. (Emphasis supplied)

[24]This is true as there is no contention nor finding that petitioner's selection of employees was discriminatory independent of their status as unfair labor practice strikers. See *supra*, note 6.

change for well over a month,[25] and then a lay off became necessary.[26]

Petitioner respectfully submits that once the strikers returned and became a part of and integrated into the larger work force necessitated by petitioner's increased business they were entitled to no more protection from lay off than the other members of the work force and were entitled to no more favored consideration than if the strike had never occurred. Assuming there had never been a strike, it is clear that the strikers could lawfully have been considered for layoff on a basis of equality with all other members on the work force.[27] Thus, just as if the strike had never occurred, petitioner considered all employees, including strikers, for lay off and applied a uniform test in selecting which employees to lay off. To have done otherwise would have violated the Section 7 rights of the employees who elected not to participate in the strike.

The Board's ruling clearly abrogates the Section 7 rights of non-strikers by directing petitioner to afford the returning strikers' preferential treatment over non-strikers

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[25]Although the decision indicates that lay offs occurred as early as May 1st, a review of the record indicates that there is no claim that any of the returning strikers were laid off before May 14, 1965 (R. 10-12)

[26]The Board and the court of appeals found that the lay off was caused by the swollen work force resulting from petitioner's failure to discharge strike replacements at the time the 105 strikers were reinstated (App. A, p. 8; App. B, p. 20, note 9); however, this finding is clearly without any support as it is uncontradicted that at the time petitioner reinstated the strikers the increased business and institution of a second shift required the retention of all replacements, non-strikers and returning unfair labor practice strikers.

[27]App. B. p. 53, note 7.

and replacements in consideration for a lay off.[28] To uphold the Board's decision would establish a rule of law requiring employers to treat strike replacements and non-strikers as second class workers since it clearly requires that they be laid off ahead of returned strikers regardless of any other consideration.

Clearly, such an order is in direct conflict with and substantially interferes with the non-striking and replacement employees' right to refrain from engaging in protected, concerted activity under Section 7 of the Act.

2. The instant decision violates the rights of non-strikers and strike replacements to liberty and property contrary to the due process clause of the Fifth Amendment,[29] which clause applies to the actions and decisions of the National Labor Relations Board. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Local 74 United Broth. of Carpenters & Joiners of America, A. F. of L.*, 181 F.2d 126 (5th Cir. 1950) *aff'd.* 341 U.S. 707; *NLRB v. Washington Virginia & Maryland Coach Co.*, 85 F.2d 990 (4th Cir. 1936), *aff'd.* 301 U.S. 142.

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[28]The Board's Order, which was approved by the court of appeals, directed petitioner to discharge, if necessary, strike replacement in order to make room for returned strikers who were subsequently laid off (App. A, p. 10; App. B, pp. 21, 24).

[29]The Fifth Amendment reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amendment V.

Although the Fifth Amendment contains no equal protection clause and provides no specific guarantee against discriminatory action by Federal administrative agencies, *Hirabayashi v. United States*, 320 U.S. 81, it does protect persons against discrimination that is so arbitrary and injurious as to violate the due process clause. *Hirabayashi, supra; Detroit Bank v. United States*, 317 U.S. 329; *Emploing Lithographers of Greater Miami, Florida v. NLRB*, 301 F.2d 20 (5th Cir. 1962). Further, this Court has recognized that numerous employee rights not only constitute liberty but also property protected by the due process clause. *Adair v. United States*, 208 U.S. 161; *Local 74, United Broth. Carpenters, supra* at 132; *Texas & P. Ry. Co. v. Broth. of R. Trainmen*, 63 F. Supp. 640, 644 (D.C. La. 1945) reversed on other grounds 159 F.2d 822 (5th Cir. 1947) *cert. denied* 332 U.S. 760; *Ellis v. United States* 206 U.S. 246.

Petitioner contends that the right of its non-striking and replacement employees to refrain from the activities guaranteed by Section 7 of the Act is a right to liberty and property protected by the due process clause. Clearly, the instant decision requiring petitioner to discharge them, if necessary, in order to reinstate laid off strikers is so inherently arbitrary and discriminatory as to deny petitioner's non-striking and replacement employees their rights to liberty and property without due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a printed copy of the foregoing Petition for Writ of Certiorari and Appendices thereto has this day been served by air mail first class, return receipt requested, on the following counsel at the addresses listed below:

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Dated at Miami, Florida this day of , 1969.